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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC-01-215-54458 Office: Vermont Service Center Date: JUN 19 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a telecommunications business with 146,000 worldwide employees and a gross annual income of $62 billion. It seeks to extend its authorization to employ the beneficiary as a finance manager for a period of one year. The director determined the petitioner had not established that the beneficiary was eligible for any further extensions.

On appeal, counsel submits a brief.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The director denied the petition because the petitioner had not established that its form I-140, Immigrant Petition for Alien Worker, or its ETA 750, Application for Alien Employment Certification, had been pending for at least 365 days, pursuant to Section 106 of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (AC21).

On appeal, counsel states, in part, as follows:

> The Petition should have been granted under the provisions of AC 21 Section 104(c) because the Beneficiary is a national of India, which at the time of filing was under a per country ceiling and the INS completely failed to address Beneficiary's eligibility for the benefit sought.

> According to INS's own interpretation of the AC-21 law, Petitioner met the standards of eligibility for the benefit sought, because the adjudication occurred on the 365th day of filing of a Labor Certification Application.

Section 104(c) of AC21 enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application of status has been adjudicated. Counsel is incorrect in her argument that there is no obligation for the I-140 petition to have been approved. As the above statute indicates, the beneficiary must be eligible to adjust status except for the per-country limitations. (Emphasis added). An individual would not be allowed to adjust status with a pending rather than approved I-140 petition. The record indicates that at the time of the filing of the present petition, the petitioner's I-140 petition on behalf of the beneficiary was pending. 8 C.F.R. 103.2(b)(12) states that an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed.

Section 106 of AC21 provides that:

> (a) the H-1B nonimmigrant is the beneficiary of an employment based (EB) immigrant petition or an application for adjustment of status; and
>
> (b) 365 days or more have passed since the filing of a labor certification application, Form ETA 750, that is required for the alien to obtain status as an EB immigrant, or 365 days or more have passed since the filing of the EB immigrant petition.

The record indicates that the filing date on the beneficiary's Form ETA 750 is September 26, 2000, and the filing date of the petitioner's immigrant petition on behalf of the beneficiary is April 16, 2001. As such, the record does not demonstrate that at the time of the filing of the instant petition for an extension of the beneficiary's nonimmigrant H-1B status on June 5, 2001, either 365 days or more had passed since the filing of the labor certification application, Form ETA 750, or since the filing of the EB immigrant petition. In view of the foregoing, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.